

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

74-1492 *B*

United States Court of Appeals
For the Second Circuit

No. 74-1492

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

SALVATORE CIRAMI and JAMES CIRAMI,

Defendants-Appellants.

BRIEF OF APPELLANTS
SALVATORE CIRAMI AND JAMES CIRAMI

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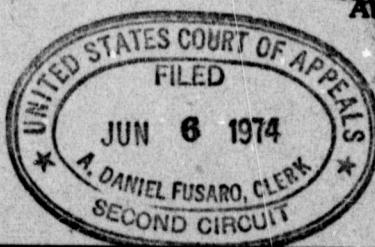




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—against—

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SALVATORE CIRAMI AND JAMES CIRAMI

Statement of Issues Presented

1. Should the court have allowed the prosecution to amend the indictment after it had completed its case?
2. Was there sufficient evidence to send the cases to the jury?
3. If the defendants owed no taxes, could they have willfully attempted to evade payment?
4. Were the truckers independent contractors?
5. Was there any evidence whatsoever that the defendants filed fraudulent information returns for 1968 and 1969?
6. Did the defendants file false employer's returns for the quarters ending December 31, 1968 and June 30, 1969?

Statement of the Case

Defendants, a father and son, are officers of an air freight distribution company. They were indicted for attempting to evade payment of Social Security and Unemployment Insurance taxes; the basis for the charges was the allegation that they had improperly listed certain truckers as independent contractors, rather than as employees (3a-6a). The government never claimed that the defendants falsified books and records; to the contrary, the prosecution admitted that these were accurate and that in addition, Information Returns Form 1099's were filed regularly setting forth the status of the drivers (57a-58a). Further, it was conceded that although the corporate books were audited by the Internal Revenue Service, the defendants were never informed that the procedure which they had followed for many years was improper (41a-44a).

After a four day trial before Hon. Mark A. Constantino and a jury, both defendants were found guilty of 18 of the 19 counts set forth in the indictment (151a-152a); the sixteenth count having been dismissed during the course of the trial.

When the prosecution had completed its case, defendants moved to dismiss the indictment on, among other grounds, the fact that the defendants were charged personally with owing a corporate debt, without proof that taxes were due from the corporation (104a-107a). When it became apparent that the court agreed with the defendants' argument, the government moved and was permitted to strike as surplusage all reference to monies owed (109a-111a). In addition, the defense requested that the indictment against both defendants be dismissed; a motion which was repeated at the conclusion of the defend-

ants' case. In denying this motion and a separate motion to sever and dismiss the charges against James Cirami, the trial court repeatedly stated (139a; 145a-146a) that this was a "borderline" case, yet the matter was sent to the jury.

At various times, the court stated:

"But you are not charging them as officers. You are charging them personally, I believe, and you are going to convict them of a crime which the corporation committed.

* * *

That is what you are doing, and I read the indictment quite clearly and very closely, and I have been thinking about it throughout the whole trial."
(104a-105a)

* * *

"I will reserve on it until tomorrow morning. I would like to reflect on it. I have not heard one scintilla of evidence, even his name being mentioned as ex-president; somebody said they knew him at one point, that is all, and that really cannot make you guilty of a crime." (124a)

* * *

"We have some motions to dispose of and the first of these motions would be as to Counts 18 and 19. The Court was reviewing these counts and at this time the Court has about made up its mind to dismiss on the basis of the testimony and the evidence as to James Cirami." (125a)

* * *

"That bothers me more than anything else, that is submitting it to the jury because it seems to me this

is a kind of an innuendo sort of a situation, it could be a compromise situation in their bringing in a verdict, and that is what it seems to me from where I sit. It could readily be the result of such a situation, and such a situation is always a problem.

* * *

Not two defendants but a relationship which is existing as we have here. You don't get too many father and son trials; this is about the second one I have ever had in my whole life." (128a)

* * *

"I am assuming all this; there is nothing wrong with that. It is part of the business. The question is, is there any proof in the case, on your side of the case, giving you the most favorable interpretation of the testimony in the case, is there proof, number, one, of an intent, of a willingness of knowingly doing it?

I have sifted through the testimony the fact he signed a piece of paper doesn't show intent." (132a)

POINT I

It was prejudicial error to permit the Government to strike operative portions of the indictment as surplusage.

After the government had rested, defendants moved to dismiss counts 1 to 15 and 17 of the indictment, as there was no evidence that taxes were owed in the amounts set forth in those counts. Over objections (109a-111a),* the prose-

*Reference is made to pages (a) in the Appendix or to pages (TR) in the complete Official Transcript.

cution's subsequent motion to strike the unproven parts of each count was granted.

It is abundantly clear that the defendants were surprised by this tactic (114a). Their entire cross-examination of the principal government witness Miller (40a-58a; 61a-65a) was directed to the failure to assess taxes, and to give notice that taxes were due and owing.

It was manifestly unfair, after having caused the defendants to restrict their defenses, to remove the foundation upon which such defenses rested. Even the court recognized (112a) that the defendants did not owe money to the government; the court however, erred in concluding (113a) that as the grand jury had no right to charge them with owing a corporate tax, one could strike as surplusage the charging portion of the indictment. The fact remains; the grand jury did charge them with having failed to pay certain monies and having met and disproven such charges, an amendment to the indictment was improperly permitted.

Finally, having successfully eliminated the amounts owed by defendants from the indictment, the prosecution in its summation (147a-148a) referred to the matter previously stricken in a grossly prejudicial exchange, over the objection of counsel and disregarding the admonition of the court. The prosecutor had the last word, and the court, although sustaining the objections of defendant's counsel, failed to instruct or caution the panel. As the case was permitted to go to the jury, the defendants, having been prevented from proving that there was no evidence that they owed the amounts originally set forth in counts 1 thru 15 and 17, were faced with the argument that their motive in attempting to evade employment taxes was to avoid payment of such amounts.

* * *

Fed. Rules Cr. Proc. rule 7(d), 18 U.S.C.A.:

"Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information."

If surplusage in the indictment is unproven by the prosecution, and has the effect of misleading a defendant, the indictment is incurably invalidated. *United States v. Le-May*, 330 F. Supp. 628 (D. Mont. 1971). Clearly, the government failed to prove the amount of money owed, but instead misled the defendants into believing that they were being charged with owing the money personally, when in fact, this was an unassessed corporate debt.

It is settled law that an amendment to an indictment must be returned to the grand jury. *United States v. Denny*, 165 F.2d 668 (7th Cir. 1947), *cert. denied*, 333 U.S. 844 (1948). The government has attempted to change an amendment of substance to a motion to strike as surplusage, and in so doing, seeks to by-pass the requirements of due process.

Rule 7(d) merely restates the conclusion of *Ex Parte Bain*, 121 U.S. 1 (1887), that even surplusage in an indictment, may not be struck, except by the defendant. We suggest that this indictment may have been brought solely upon the parts improperly stricken. We urge that the substantial amount of taxes allegedly underpaid may have resulted in the indictment. *Accord, Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969); *see, United States v. Edwards*, 465 F.2d 943 (9th Cir. 1972), discussing the "confused state" of the law as to an amendment of an indictment, but citing Rule 7(d) in that only the defendant is able to strike surplusage. *But see, United States v. Russo*, 155 F. Supp. 251 (D. Mass. 1957).

POINT II

The Court should not have permitted the defendants' cases to go to the jury.

Testimonial evidence against James Cirami is so thin that its very existence may be questioned. Government witnesses Anderson (Tr 73-Tr 86), [B]erkofsky (Tr 109-Tr 116), Miller (33a-65a), Blody (Tr 194-Tr 207) and Boline (Tr 211-Tr 213) did not even mention his name.

Strahl (Tr 42-Tr 64) said (10a) that trucks were assigned to him *either* by Salvatore *or* by James *or* by the dispatcher. Fleischer (Tr 87-Tr 109) was led by the prosecutor (Tr 104) into stated that he asked permission of *either* the father *or* the son when he took a truck. Liebman (Tr 117-Tr 127) admitted that she knew James and Salvatore Cirami but refused, despite urging (30a), to credit either defendant with establishing the bookkeeping or owner-driver systems, as they were already in operation when she first began to work. Even the prosecutor admitted that (123a) James said nothing to her.

The only witness whose testimony made any direct reference to him was Lynch (Tr 64-Tr 72). However, a fair analysis of this testimony reveals scant evidence of any activities by James, and no evidence of complicity, duplicity or intent. Lynch testified (Tr 65) that he "met Salvatore once and James a couple of times": and worked for them for less than three weeks (Tr 67). He spoke briefly to James Cirami, but was hired by the dispatcher. He discussed wages; the fact that he would be self-employed; and responsible for his taxes and Social Security (14a).

Undoubtedly, the government relied on the signing of certain documents by James Cirami, in order to implicate him in the crimes charged. It is obvious that the signing

of a form by a corporate officer may be a ministerial act, done only because a bookkeeper or accountant prepared certain papers for him to sign. Salvatore (99a-101a) testified that although James ran the business when he was in Puerto Rico, the son continued to run it as he found it, and did not institute new policies. Accountant Johnson (77a; 84a-85a) caused Form 1099's to be filed; and denied having any conversations with James (Tr 285). Attorney Vidur did not mention James Cirami. Significantly, the government's summation (Tr 411-Tr 430) never mentioned James Cirami, by name, word, deed or implication.

A person cannot aid or abet a crime which has already been completed. *Roberts v. United States*, 416 F.2d 1216 (5th Cir. 1969). Not one witness has suggested that James Cirami was an originator of a scheme to evade taxes; to the contrary, the testimony of Salvatore is that James continued the business operations which were began by his father (99a-101a). James added no elements to any scheme or device; if in fact, a scheme to defraud ever existed, it was commenced long before, and James played only a passive holding role, and assuredly not a "purposive attitude" in the day-to-day operations of the business. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

Without a guilty principal, there can be no aider or abettor. *United States v. Jones*, 425 F.2d 1048 (9th Cir. 1970), cert. denied, 400 U.S. 823; *United States v. Titus*, 210 F.2d 210 (2nd Cir. 1954). The instructions in the case (Tr 450) failed to state clearly that someone must have committed the crime charged; this is basic error. Assuming *arguendo*, that James Cirami has been properly charged as an aider and abettor, there is no evidence of the requisite affirmative participation (unless we consider merely signing documents as a corporate officer) which encouraged the

original perpetrator. *United States v. Atkins*, 473 F.2d 308 (8th Cir. 1973), *cert. denied*, 412 U.S. 931. Mere knowledge that a crime was being committed, together with presence at the scene, is not enough to constitute aiding and abetting. *United States v. Garguilo*, 310 F.2d 249 (2d Cir. 1962); *United States v. Bryant*, 461 F.2d 912 (6th Cir. 1972).

Why the trial court did not dismiss the case against James Cirami is wholly inexplicable. It stated (125a-126a) that there was nothing in the record to show that this defendant was aiding and abetting a crime, but that all he did was to sign papers on behalf of a corporation. The court actually foresaw (128a) the danger of submitting this case to a jury on the basis of inuendo and the relationship between father and son. *Snyder v. United States*, 448 F.2d 716 (8th Cir. 1971). See also 132a, where again the trial court stated that the only evidence against James was signing of returns, and this was *not* evidence of intent. Cf., *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972). Notwithstanding these beliefs, the court denied the motion to sever after the government had rested (137a), and requested that defendants go forward with their case. All of his statements lead but to one conclusion; at that time, the Judge felt that there was no case against James, and only if additional evidence was introduced on the defendant's case, would he then refuse to dismiss. This is the critical juncture of the case as to James Cirami; as discussed hereinbefore, none of the witnesses called by the defendants (Johnson, Vidur or Salvatore Cirami) suggested that James was either a principal, an aider, an abettor, or co-conspirator.

A fair reading of the remarks made by Judge Costantino is that the court erroneously reserved decision until the conclusion of the defendants' case (124a), and then errone-

ously refused to dismiss after a renewal of the motion as to both defendants, although no additional evidence was introduced against them.

"I will reserve on it until tomorrow morning. I would like to reflect on it. I have not heard one scintilla of evidence, even his name being mentioned as ex-president; somebody said they knew him at one point, that is all, and that really cannot make you guilty of a crime."

The court (139a; 145a-146a) repeatedly characterized this as a "borderline" situation, but in no way suggested why its earlier conclusion (125a; 128a; 132a) that there was *no* evidence of intent by James, had been *sua sponte* converted to a "borderline" situation.

If ever a case cried out for relief; if ever there was a situation where guilt by association, guilt by blood relationship, and guilt by mis-understanding on the part of an unsophisticated jury permitted an improper verdict to be reached, this is the case. There was no evidence against James at the conclusion of the prosecution's case; there was no evidence against James after the government's rebuttal case (TR 380-TR 383).

Before submitting this case to the jury, the trial court was required to determine whether it could direct a verdict for the prosecution, and the government was obliged to submit proof beyond a reasonable doubt, not merely a preponderance of evidence. Here the Judge had a doubt, which he set forth in the record. How then could he let the jury decide the guilt of Salvatore and James Cirami? *United States v. Taylor, supra*, applies with equal force to both defendants, and is authority for a reversal of the verdicts below.

Finally, it should be noted that the prosecution moved (137a) to dismiss counts 12, 13, 14 and 17. While the motion was opposed by the defendants and denied, the fact that it was even made gives rise to a reasonable inference, that the government considered that there had been a failure of proof as to these counts in the case of *each* defendant.

POINT III

The defendants could not willfully attempt to evade taxes which were not due and owing.

The courts have repeatedly held that the elements of § 7201 are willfulness; the existence of a tax deficiency; and an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343 (1965). A further issue here is not only whether there was a deficiency owed by Air Package and Air Freight, but whether the government had the obligation to inform the defendants by making a valid assessment, before it could claim in a criminal prosecution that they had willfully failed to pay the tax. See, *United States v. Moody*, 339 F.2d 161 (6th Cir. 1964), *cert. denied*, 386 U.S. 1003 (1967); *United States v. England*, 347 F.2d 425 (7th Cir. 1965).

While the foregoing cases refer to income tax evasion, and the Ciramis were convicted of attempted evasion of insurance and employment taxes, the same principles must apply, unless we are to strip the corporate veil whenever such taxes are due. Clearly, there is no authority to ignore the corporate form; as these are primarily corporate obligations, absent proof of demand upon the corporation and failure to make payment, no monies whatsoever are due, and no evasion of taxes has taken place. In this connec-

tion, Salvatore Cirami testified (91a-94a; 99a) without contradiction, that no notice was ever received that corporate taxes were due and owing.

The mere existence of a deficiency is not an element or proof of willfulness. A valid assessment must first be made, and proof of taxes due originally from the corporation, then derivatively from the individual officers responsible for their collection. The corporation, not its president, was the "person" required to collect taxes. *United States v. Merriwether*, 329 F. Supp. 1156 (D. Ala. 1971), *aff'd*, 469 F.2d 1406 (5th Cir. 1972) was a prosecution for failure to pay over F.I.C.A. and F.U.T.A. taxes. A corporate officer was found to have aided and abetted a corporation, but only after the prosecution first established that the corporation failed to pay the taxes withheld.

The defendants' motion to dismiss because of lack of proof that the corporation owed taxes (102a-104a) was apparently favored by the trial court (102a-109a). Unfortunately, the issue was never resolved, for after the court returned from a recess, the government moved (109a) to strike as surplusage the statement of taxes owed. The government's motion was an evasion, rather than meeting the basic complaint against the indictment fairly; by so evading, the prosecution deprived the defendants of this defense.

In *United States v. Berger*, 325 F. Supp. 1297 (S.D.N.Y. 1971), *aff'd*, 456 F.2d 1349 (2d Cir. 1972), *cert. denied*, 409 U.S. 892, it was held that the taxes must be due from a corporation before the individual officers can be charged. In addition, on the issue of willfulness, the government was required to demonstrate affirmative acts, beyond mere proof of understated taxes. The prosecution proved the transfer of invoices from the parent corpora-

tion to a subsidiary. Further, there were separate entries made, and false records kept. This is not the Ciramis case; see testimony of Special Agent Miller (57a-58a). *Berger* bears little relation to Cirami; yet, the trial court specifically indicated that it was on the authority of *Berger* (115a) that the indictment was sustained. *Berger* is not authority for refusing to direct a verdict of acquittal; reliance on *Berger* is clear error.

* * * *

United States v. Pawlak, 352 F. Supp. 794 (S.D.N.Y. 1972) holds that a single understatement of income alone is not evidence of willfulness; instead a consistent pattern of underreporting large amounts is required. Here, the government must prove an act in each of the quarters and each of the years set forth in the indictment. Here, the government has attempted to show willfulness by proving that the defendants entered into arrangements to hire certain drivers as owner-operators, claiming that if these truckers were not truly independent contractors, willfulness and intent is established. By analogy to personal income taxes, a single instance of claiming a driver as an independent contractor is not sufficient to establish willfulness, particularly as the government never claimed that this was an improper procedure, even after full audit of the corporation (41a-43a).

Count 1 of the indictment alleges that for the quarter beginning January 1, 1967 and ending March 31, 1967, an attempt was made to evade payment of F.I.C.A. and F.U.T.A. taxes. It was the government's contention that the means by which the evasion took place was listing certain individuals as independent contractors, rather than

as employees. Assuming *arguendo*, that the government is correct as to the first quarter, there was never a separate intent to evade in any subsequent period. Instead, once the business operation and procedure was established in the first quarter, it was automatically followed by the book-keeper (30a) without any additional intent or contribution to the scheme by the individual defendants. Since no conspiracy has been charged, the government must prove that specific acts indicating willfulness and intent occurred each year, for specific intent to violate sections 7201 and 7206 is necessary to these charges. *United States v. Brown*, 411 F.2d 1134 (10th Cir. 1969). The jury was not instructed in regard to specific intent for counts 18 and 19 (149a-150a); in fact, the charge does not even mention count 19, a fatal error.

Similarly, exhibit 19 are W-2 Forms for employees, permitting the government to argue that as the defendants failed to file such forms for truckers, they deliberately and willfully choose to list them as independent contractors. Conversely, an argument may be made in regard to the Forms 1099 (exhibits 4 and 5): full disclosure of the independent contractors' status of the truckers negates any intent to conceal the truth or to evade taxes by subterfuge. An analysis of the dates on the W-2's shows that seven are dated May 20, 1969; four are dated before the period set forth in the indictment; three are undated; one (Cooper, in duplicate) appears to be May 20, 1969; and one is dated January, 1970. Accordingly, the only date for which this exhibit has any significance is May 20, 1969, the same period set forth in count 10 of the indictment which is discussed hereinafter in Point VI.

POINT IV

Evidence that the corporation's drivers were independent contractors was overwhelming: The issue should not have been sent to the jury.

It was found in *United States v. Taylor, supra*, that unless the trial judge finds evidence of guilt beyond a reasonable doubt, an issue should not be presented to the jury. As held in *Danielson v. Local 814, Internat'l Bro. of Teamsters, etc.*, 355 F. Supp. 1293 (S.D.N.Y. 1973), notes a civil test used in making a determination of independent contractor status; Cirami contends that such test is too indefinite for a criminal conviction. Defendants urge that the facts in this case were so inconclusive, that the court erred in sending the question to the jury. As a matter of law, it should have concluded that the government failed to prove beyond a reasonable doubt that the drivers were employees, but were instead independent contractors. Absent such proof, the prosecution's entire case against the Ciramis must fall.

Despite the prosecution's urging to the contrary, there is no evidence of *control* over the drivers. Strahl, (8a-9a) stated that sometimes the dispatcher told him what to do, but when he had a steady run, he made his own schedule without supervision. His testimony (10a) as to a lease agreement for his truck is in conflict neither with Cirami nor with being an independent contractor. The preparation of two checks, one for services rendered and one for the cost of leasing the vehicle, (exhibit 6) is not inconsistent with an owner-driver arrangement, and Strahl, and the other drivers were aware and consented to the endorsement of rental checks for them (11a). No inference may be drawn from the use of time cards; see Cirami's explanation of their purpose (95a-96a). Significantly, Strahl was told

when he came to work that he would be a sub-contractor, and would be responsible for his own taxes (Tr 58-Tr 59). Lynch was also told that he would be self-employed and responsible for his own taxes (15a); Anderson stated that he made his own arrangements for routing deliveries (18a); Fleischer was told when first employed that he would be an owner-operator (20a) and used the truck for outside work other than that performed for the Ciramis (26a). No trucker testified that he objected to his independent contractor arrangements; all of the prosecution's witnesses understood the arrangements and elected to ignore their personal tax obligations.

The written agreements with the drivers were not inconsistent with an owner-operator relationship. The accountant, Johnson advised Cirami that the earlier agreement (exhibit 15) should be brought up to date and reviewed by an attorney (74a). Thereafter, Johnson, Attorney Vidur and Salvatore Cirami made revisions which resulted in the 1970 agreement (76a-82a; exhibit 1). Significantly, Johnson considered these agreements to provide for services by drivers who were independent contractors, as did Cirami (83a). Salvatore Cirami testified without contradiction that when drivers first entered into a business relationship with him, they were specifically told that they would be independent contractors (90a), and that he had been operating in this manner since 1958 (91a). Full and complete audits were had of his company well before the period set forth in the indictment; the Revenue Agent had access to all of the truckers' agreements and the corporate books and records (92a-93a), yet no notice was received or the slightest suggestion made that he was not operating in a proper manner (94a; 98a; 140a-141a), a fact confirmed by Miller. *Quere*: if even the Internal Revenue Service from 1958 through 1965 did not question the in-

dependent contractor status of the drivers, should a jury have been permitted to decide the issue?

* * * *

The testimony of Blody (Tr 194-Tr 207) was highly prejudicial, of little probative value, and admitted over repeated objections. The most damaging aspect of Mrs. Blody's testimony was that she was permitted to discuss (68a-69a) certain forms received by Local 295, Welfare Fund which classified four drivers as employees, rather than as independent contractors. Presumably, the purpose of this evidence was to demonstrate to the jury that the Ciramis willfully and with intent to defraud, listed the four as independent contractors for purposes of taxation, whereas, they knew that the truckers were employees, listing them as such for Local 295. Although the documents were not admitted in evidence, the witness read from them over objection, and identified the signature on an application for disability benefits as that of Salvatore Cirami. In addition, testimony as to four drivers is not controlling when there were 20-30 truckers servicing the corporation.

It is obvious that Cirami, who started his own career as a driver, signed the forms so that the four individuals could get disability benefits (70a-72a; 97a). An "employee" for purposes of disability is not necessarily an employee for purposes of taxation. The fact that drivers were also members of Local 295, did not make them employees. It was necessary that certain drivers carry union cards so that deliveries could be made to and from local airports (87a).

POINT V

Counts 18 and 19 should not have been permitted to go to the jury; there is no evidence whatsoever to sustain the conviction of either James or Salvatore Cirami as to these charges.

Counts 18 and 19 allege that both defendants willfully assisted, aided, advised, prepared and filed false and fraudulent United States Information Returns (Form 1099) for the calendar years 1968 and 1969, respectively. It is further alleged that the material misstatement contained in the documents was that they represented the [receipt] of payments from the corporation as independent contractors, rather than as employees.

An analysis of the actual exhibits, as well as of the testimony of the witnesses called by the prosecution and the defense, indicates that neither defendant caused the documents to be filed or assisted in their preparation, and that for at least one of the years in question, payment as independent contractors was not indicated.

Martin Johnson, a certified public accountant for over 22 years, is by profession, trained to understand the importance of words and numbers. He clearly and unequivocably stated not once, but twice, (77a; 84a-85a) that he prepared and caused to be filed the 1969 returns which are the basis for count 19. No government witness contradicted this and stated that instructions or assistance were obtained from the defendants; to the contrary, see Liebman at 30a.

As to count 18, exhibit 4 are the Form 1099's relied on by the prosecution. The amount paid each of the truckers is listed under column "6": "Annuities, Pensions and other Fixed or Determinable Income". Column "7" is the place wherein commissions, fees and similar remuneration to

non-employees are listed. Clearly, on the face of this exhibit, the Internal Revenue Service could not have been misled into believing that certain individuals were independent contractors, rather than employees. By way of comparison, reference is made to exhibit 5, the 1969 calendar year returns, wherein payment is set forth under column "7". However, for 1969, Johnson "caused them to be prepared" and "caused them to be filed"; not the defendants.

POINT VI

Counts 8 and 10 should not have been permitted to go to the jury; there is no evidence whatsoever to sustain the conviction of either James or Salvatore Cirami as to these charges.

Counts 8 and 10 of the indictment allege that Salvatore and James Cirami attempted to evade Federal Insurance Contributions Act taxes by preparing or causing to be prepared, and filing or causing to be filed false and fraudulent employer's quarterly returns for the periods ending December 31, 1968 and June 30, 1969, respectively. The testimony at trial is wholly devoid of any admissions made by the defendants; no other witnesses stated that any action connected with these counts was taken by the Ciramis.

The only evidence which might conceivably support the government's charges as to these allegations were the Form 941's which were filed for these quarters. Examination of such documents (exhibit 7) reveals that for the quarter ending December 31, 1968 (count 8) and for the quarter ending June 30, 1969 (count 10), although returns were filed, they were unsigned. Since there is no testimony sustaining the charge in the indictment that defendants personally prepared, filed or directed others to prepare or file these documents, and since they do not bear the signature of either Salvatore or James Cirami, there has been a total failure of proof as to these counts.

CONCLUSION

Salvatore and James Cirami deserve better than "borderline" law. They stand convicted as felons on facts that the trial court should not have permitted to go to the jury. They stand convicted as felons because the trial court refused to accept its responsibility, and instead, allowed twelve men to decide where one could not.

For these reasons, and because of the cases and authorities set forth herein, the judgments below should be reversed and the indictment dismissed.

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Respectfully submitted,

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